



Highlights in International Trade and Commerce

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The International Law Section of Williams Mullen prepared the following brief descriptions of selected issues in international trade and commerce for general information purposes and use by clients and friends of the firm.

1. [Higher Court Rejects Constitutional Challenge of Byrd Amendment.](#)
2. [USTR Sets Trade Policy Agenda for 2009.](#)
3. [WTO Continues to Reject "Zeroing."](#)
4. [Surprises Lurk in "Buy American" Requirements of Stimulus Package.](#)

1.Higher Court Rejects Constitutional Challenge of Byrd Amendment In a major decision for petitioners in antidumping and countervailing duty cases, the Federal Circuit has held that Congress may limit "Byrd Amendment" funds to petitioners and U.S. producers that support the petition. As previously reported in these HIGHLIGHTS, the Byrd Amendment, now repealed, provided for the distribution of antidumping and countervailing duties to petitioners and companies that supported the petition. In a 2006 decision, the U.S. Court of International Trade (CIT) held that restricting the Byrd Amendment payouts only to U.S. manufacturers that supported a petition violated the Equal Protection Clause. In a separate decision the CIT held that such a restriction violated the right of Free Speech. Under these decisions of the lower court, foreign-owned U.S. producers that did not support an antidumping petition would nevertheless qualify to receive a share of the antidumping duties collected by Customs. On appeal, a two-judge majority of the Federal Circuit rejected these arguments, finding the limitation to be constitutional. Specifically, the Court of Appeals found that it was rational to limit Byrd money to petitioners and companies supporting the petitioner because the government benefits from the participation of such companies: ". . . Congress rewards only successful enforcement effort." The dissenting judge rejected this view, finding that "the Byrd Amendment has nothing to do with rewarding helpfulness during trade investigations." Given the enormous amount of Byrd money at stake, watch for a motion for rehearing en banc.

2.USTR Sets Trade Policy Agenda for 2009: On March 2, the U.S. Trade Representative (USTR) released its annual Trade Policy Agenda, entitled "Making Trade Work for American Families." The Agenda is introduced by a reference to the importance of trade to the economy and notes that global trade is projected to decline in 2009. Announcing that the Obama Administration is committed to "rules-based" international trade, the Agenda states that pending free trade agreements with Colombia, Panama and Korea will be presented to Congress. The U.S.-Panama agreement will take priority ahead of the U.S.-Colombia agreement, which had been first in line in the Bush Administration, but there is no specific time line for introduction of legislation. Agreements with Colombia and Korea will be presented later as these countries meet "benchmarks" yet to be determined. Moreover, the new Administration

pledges to review all pending trade agreements and "conduct extensive outreach and discourse with the public on whether these agreements appropriately advance the interests of the United States and our trading partners." Regarding the North American Free Trade Agreement (NAFTA), the Agenda hedges as to whether the agreement will be reopened or merely tweaked: "We will also work with Canada and Mexico to identify ways in which NAFTA could be improved without having an adverse effect on trade." The Doha Round is discussed, but the emphasis is placed on obtaining more concrete commitments from our trading partners to open foreign markets. Climate change legislation is contemplated, and the Agenda foretells a potential clash with international trade rules: "We should ensure that climate policies are consistent with our trade obligations, but we also should be creative and firm in assuring that trade rules do not block us from tackling this critical environmental task." Regarding the Generalized System of Preferences (GSP) and other preference programs, the Administration indicates that preferences should be limited to "the poorest countries." This reference likely signals continued debate over preferences awarded to countries such as India and Brazil.

3. WTO Continues to Reject "Zeroing": On February 25, the World Trade Organization (WTO) Dispute Settlement Body formally adopted the report of the Appellate Body in "United States - Continued Existence and Application of Zeroing Methodology." As discussed in past HIGHLIGHTS, "zeroing" refers to the practice of ignoring fair value sales when calculating antidumping margins. That is, the antidumping authorities calculate the amount by which goods are dumped but do not give any "credit" for sales that take place at prices above "normal value." In principle, zeroing means that dumpers are charged for dumping much as traffic laws are enforced: you pay a fine for speeding but do not get credit for driving below the speed limit. In this latest decision, the Appellate Body found that the United States violates the WTO Antidumping Agreement when it "zeroes" in administrative reviews and sunset reviews of antidumping orders. Although earlier Appellate Body decisions rejected zeroing in antidumping investigations, the language of the WTO Antidumping Agreement provided for the use of a different methodology in administrative reviews. The decision therefore caused additional concerns that WTO panels are not affording any deference to national administrative agencies that adopt reasonable interpretation of the Antidumping Agreement. In reaction to the decision, USTR indicated that it was "highly disappointed" and would continue to address the issue within the WTO.

4. Surprises Lurk in "Buy American" Requirements of Stimulus Package: Look for a separate e-mail transmitting the latest edition of the International Trade & Customs Alert regarding "Buy American" requirements of the recently enacted stimulus package. In particular, the Alert discusses unexpected ways in which the new "Buy American" requirements apply or fail to apply, depending on such circumstances as what foreign goods are being procured, what country they come from, and whether the procuring government agency is at the state or local level.

If you have any questions concerning the subject matter addressed above, please feel free to contact any of the attorneys listed on the left.

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For comments or suggestions, please contact the publication editor, Jimmie V. Reyna, Esq.

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